In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 511

CHARLES SICKMAN, PAUL L. RYAL, KENNETH L. MARTIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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28 U.S.C. 2680(a) exempts from the Federal Tort Claims Act's coverage two distinct types of claims: (1) those based upon an act or omission of a government employee, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, and (2) those based upon the performance or failure to perform a discretionary function or duty on the part of a government agency or employee, whether or not the discretion involved be abused.

The court below, in a decision we regard as correct, invoked both parts of Section 2680(a) and thereby denied jurisdiction to the district court to adjudicate crop damage claims asserted against the United States on account of the depredations of wild geese protected by the Migratory Bird Treaty Act. No prior appellate opinion has invoked both phases of this "highly important exception" in the Federal Tort Claims Act. See House Report No. 1287, 79th Congress, 1st Session, on H.R. 181, pages 5-6.[1]

While petitioners' argument, on the merits, that the Government must answer for depredations committed by migratory wild birds may seem frivolous, the tremendous volume of litigation under the Federal Tort Claims Act undoubtedly makes the jurisdictional questions presented by the petition as to the interpretation of "the highly important exception" one which is appropriate for consideration and decision by this Court. The need for such an interpretation is underscored here by the fact that less than three months after the instant decision the same court completely ignored Section 2680(a) in the case of *Stewart* v. *United States,* in which we intend to file a petition for a

[1] All prior opinions discuss only the "discretionary function" aspect of Section 2680(a), ignoring completely its exclusion of claims based upon acts occurring in the execution of a statute or regulation. *Coates* v. *United States,* 181 F. 2d 816 (C.A. 8); *Denny* v. *United States,* 171 F. 2d 365 (C.A. 5), certiorari denied, 337 U.S. 919. See also *Oman* v. *United States,* 179 F. 2d 738 (C.A. 10); *State of Maryland* v. *Manor Real Estate and Trust Company,* 176 F. 2d 414 (C.A. 4).

writ of certiorari. There, as will more fully appear from our petition, the court below held that the United States was negligent in the manner in which it stored and safeguarded certain explosives at a military reservation. It did not find negligence on the part of any identifiable officer or employee of the United States. Yet the method of storing and safeguarding of explosives would seem to involve peculiarly a matter of carrying out orders or regulations on the one hand, or the exercise of discretion on the other.[2]

For the reasons stated, the United States does not oppose the granting of the writ of certiorari.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

March
~~FEBRUARY~~, 1951.

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[2] The *Stewart* decision, dated January 10, 1951 and not yet reported, was by a divided court with Judge Duffy dissenting from Judge Major's opinion in which Judge Swaim concurred. Neither the dissent nor the majority opinion makes any reference to Section 2680(a), despite the fact that the applicability of that Section seems self evident and, we have been advised, was strongly urged at the rehearing. The instant case was decided by a unanimous court on October 24, 1950, with Judges Major, Duffy, and Kerner sitting.

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